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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

EARL FOREMAN, et al.,

Petitioners,

vs.

AS MID AMERICA, INC., A Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR CERTIORARI

This is an unexceptional case involving the straightforward application of federal preemption principles. The fourteen petitioners (collectively, "Plaintiffs") are former employees of Respondent AS Mid-America, Inc. ("AS Mid-America" or the "Company"), who worked for the Company during a strike in 1993. They filed suit against AS Mid-America seeking recovery for the Company's alleged failure to protect them from harassment directed toward them by returning strikers. Their lawsuits set forth five separate claims for relief. The first cause of action asserts a breach of Plaintiffs' third party beneficiary rights under a strike settlement agreement called the "Return to Work Resolution." The second cause of action asserts a breach of an oral contract based on the Company's alleged promises of permanent employment in a harassment-free workplace. The third cause of action claims breach of an implied unilateral contract of employment based on AS Mid-America's Rules of Conduct. Plaintiffs' fourth and fifth causes of action allege claims for fraudulent misrepresentation and intentional infliction of emotional distress respectively. Plaintiffs seek damages for lost wages and benefits, future earnings and emotional distress.

AS Mid-America moved for summary judgment on all of Plaintiffs' claims, on the grounds that they were preempted by the National Labor Relations Act ("NLRA") and by Section 301 of the Labor Management Relations Act ("Section 301"). AS Mid-America also argued that Plaintiffs' claims had no merit as a matter of state law.

On January 30, 1997, the Lancaster County district court granted the Company's motion for summary judgment on the grounds that the NLRA preempted all of Plaintiffs' claims. The district court did not address the Company's additional arguments for granting summary judgment.

On September 25, 1998, in a carefully considered opinion, the Nebraska Supreme Court affirmed summary judgment on all but one of Plaintiffs' claims. The court held that the NLRA preempted Plaintiffs' oral contract claim, because the Company's failure to provide Plaintiffs with a harassment-free workplace was actually or arguably prohibited by the NLRA.[1] The court then concluded that Section 301 preempted Plaintiffs' third party beneficiary claim because that claim required interpretation of a strike settlement agreement. The court dismissed Plaintiffs' implied contract and intentional infliction of emotional distress claims as lacking merit under state law. The court, however, remanded Plaintiffs' fraudulent misrepresentation claim to the district court for further proceedings.

No compelling reason warrants granting Plaintiffs' petition for certiorari. Plaintiffs' argument that the

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[1] Plaintiffs alleged that the promises of a harassment-free workplace were also embodied in a letter from Dennis Hiser, the Company's Division Director, to all employees. The Nebraska Supreme Court concluded that, because the Hiser letter essentially summarized the promises of a harassment-free workplace, the Hiser letter was also preempted by the NLRA. (App. 30).

Nebraska Supreme Court misapplied Supreme Court precedent on the preemption of state law claims by the National Labor Relations Act does not provide compelling grounds for Supreme Court review. See S. Ct. R. 10. Further, the Nebraska Supreme Court did not depart from Supreme Court precedent, but instead faithfully adhered to the principles outlined in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The court correctly held Plaintiffs' oral contract claims were preempted because they sought to adjudicate important rights guaranteed and governed by the NLRA – namely, the fundamental rights of employees under Section 7 of the NLRA to participate, or refrain from participating, in activities associated with labor unions.

Plaintiffs' contention that their third party beneficiary contract claim raised an important Section 301 preemption issue "which has not yet been decided by this Court" (Pet. at 8) is equally unworthy of Supreme Court review. Far from deciding an issue of first impression, the Nebraska Supreme Court merely applied this Court's longstanding holding in *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962): claims founded on rights contained in a strike settlement agreement, such as Plaintiffs' claim here, are preempted by Section 301. In short, there is nothing about this case that warrants or justifies review by this Court.

COUNTER STATEMENT OF THE CASE

I. Relevant Facts

AS Mid-America operates a commercial printing plant in Lincoln, Nebraska. In 1993, the Lincoln plant employed approximately 690 hourly bargaining unit workers. The workers were represented by Graphics Communication International Union, Locals 520 and 221, and International Association of Machinists Local 31 (the "Unions").

On April 27, 1993, these hourly workers began a strike against the Company.[2] In an effort to continue operations during the strike, AS Mid-America hired replacement employees ("strike replacements"). The Company also urged regular, pre-strike employees ("crossovers") to cross the picket line and continue to work despite the union-sponsored strike. By the conclusion of the strike on May 13, the Company had hired approximately 46 strike replacements, and approximately 83 employees had abandoned the strike and returned to work as crossovers.

On May 13, the Unions ratified new collective bargaining agreements and a strike settlement agreement called the "Return to Work Resolution." The Resolution effectively terminated the strike and provided for mechanisms designed "to return Company operations to normal." Toward that purpose, the parties added a provision

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[2] Dates refer to 1993 unless otherwise noted.

in the Resolution which stated: "There shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike."

Under the terms of the collective bargaining agreements between AS Mid-America and the Unions, any contractual disputes, including disputes over Company imposed discipline, was subject to challenge through an exclusive and binding grievance and arbitration procedure. By express reference in the Resolution, any disputes arising under the terms of the Resolution also had to be resolved through the grievance procedure.

The day after the strike ended (May 14), AS Mid-America's Division Director, Dennis Hiser, distributed a letter to all employees which discussed relevant terms of the strike settlement. Hiser's letter reiterated:

> The Return to Work Resolution also contains a commitment from both the Company and the Unions that "there shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike." It is essential for the future success of our operation that all parties strictly abide by this provision. Management of the Company will be closely monitoring the behavior of all employees to make sure that this provision is enforced. Any intimidation, discrimination, or harassment which does occur will be dealt with swiftly, and those individuals responsible will be subject to appropriate discipline.

In accordance with the principles of the letter, the Company formally disciplined former strikers on several occasions for acts of harassment against strike replacements. In four cases, that discipline was challenged

through the grievance and arbitration procedure and referred to an arbitrator. In one instance, discipline imposed by the Company was upheld, and in three instances the discipline was overturned.

Plaintiffs were all either strike replacements or crossovers (13 strike replacements; 1 crossover). Twelve of the fourteen Plaintiffs resigned their employment sometime after May 13, one was terminated for poor performance, and one was laid off. Plaintiffs filed no grievances protesting the Company's alleged failure to shield them from harassment. Nor did they file any unfair labor practice charges with the National Labor Relations Board ("NLRB") protesting the alleged harassment by the returning strikers or the Company's alleged "ratification" of that harassment.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Nebraska Supreme Court's Holding That Plaintiffs' Oral Contract Claims Are Preempted Under The *Garmon* Doctrine Does Not Warrant Review By This Court

The first issue presented for review "is a variant of a familiar theme." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239 (1959). Under what is commonly referred to as the *Garmon* preemption doctrine, this Court forbids state and local regulation of activities that are "protected by § 7 of the [National Labor Relations Act], or constitute an unfair labor practice under § 8." *Id.* at 244. *See also* 29 U.S.C. §§ 157, 158. The rationale behind *Garmon* preemption is straightforward: allowing the states to

regulate conduct within "the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon*, 359 U.S. at 244. "[T]he *Garmon* rule prevents states not only from setting standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Building & Trades Council v. Associated Builders*, 507 U.S. 218, 225 (1993) (citing *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986)).

"*Garmon* preemption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits." *Building & Construction Trades Council*, 507 U.S. at 225 (emphasis in original). Thus, if the same facts supporting a breach of an employment contract or tort claim would arguably constitute an unfair labor practice under the NLRA, state court jurisdiction must yield to the NLRB. *See Caterpillar v. Williams*, 482 U.S. 386, 397-98 (1987). The critical inquiry in deciding whether a matter is *Garmon* pre-empted is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978); *accord Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983). Where the controversies are identical, as they are here, state court jurisdiction is prohibited. *Sears*, 436 U.S. at 197.

A. The Nebraska Supreme Court's *Garmon* Preemption Analysis Is Ill-Suited For Supreme Court Review.

Over a span of ten pages, the Nebraska Supreme Court carefully and thoroughly analyzed *Garmon* and its progeny. (App. 12-22). In particular, the court found "guidance" from this Court's decision in *Belknap*. (App. 14). As Plaintiffs concede, the court "examined the facts of *Belknap* in detail." (Pet. at 13). Based on its interpretation of *Belknap*, the Nebraska Supreme Court found that Plaintiffs' oral contract claims were preempted by the NLRA. (App. 20).

Plaintiffs claim that the Nebraska Supreme Court's holding "is contrary to United States Supreme Court precedent and policy on the preemption of replacement workers' state law claims by the National Labor Relations Act" (Pet. at 8). A petition for writ of certiorari, however, "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Yet, the Nebraska Supreme Court's purported misapplication of a properly stated rule of law – namely, this Court's *Garmon* preemption rule as set forth in *Belknap* – is exactly what Plaintiffs ask this Court to review. Supreme Court Rule 10 explicitly declares Plaintiffs' claim to be inappropriate for review by this Court.

B. The Nebraska Supreme Court's Holding Faithfully Adhered To This Court's *Garmon* Preemption Principles

Even if Plaintiffs' oral contract claim was appropriate for review, it is clear that the Nebraska Supreme Court correctly applied this Court's preemption doctrine to conclude that the NLRA preempted that claim. Section 7 of the NLRA provides employees with the right to "refrain" from union or concerted activities, including the right to refuse to engage in a strike. *See* 29 U.S.C. § 157; *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95, 101 (1985) ("[w]hen employee members of a union refuse to support a strike . . . , they are refraining from 'concerted activity' "). Section 8(a)(1) in turn prohibits an employer from interfering with an employee's right to refrain from engaging in such protected activities. *See* 29 U.S.C. § 158(a)(1).[3] That prohibition includes placing an affirmative duty on an employer not to acquiesce in the subjugation of one group of employees' rights by another:

> [t]he [NLRA] imposes an affirmative duty upon an employer to insure that his obligations to maintain discipline in the plant and to provide his employees with the opportunity to work without interference from their co-workers is not delegated or surrendered to any union or

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[3] *See also Oklahoma Allied Telephone Co.*, 210 N.L.R.B. 916, 921 (1974) ("[t]he statute means that the right to refrain from union or concerted activities is as important as the right to engage in union or concerted activities. For an employer to interfere with the exercise of either right is equally objectionable").

> anti-union group, and an employer who acquiesces in the exclusion of employees from his plant by such a group will be regarded as having discriminated against the excluded employees in violation of Section 8(a)(3).

Brewton Fashions, Inc., A Division of Judy Bond, 145 N.L.R.B. 99, 127 (1963), *enf'd*, 361 F.2d 8 (5th Cir. 1966), *cert. denied*, 385 U.S. 842 (1966); *see also Newport News Shipbuilding*, 236 N.L.R.B. 1499, 1509-09 (1978) (holding that the employer violated Section 8(a)(2) of the Act by "acquiescing in, condoning, ratifying and failing to resist the illegal acts and conduct of [union members]").

Here, Plaintiffs claim that AS Mid-America failed to protect them from the harassment and interference of their co-workers, which resulted from Plaintiffs' exercise of their Section 7 right not to participate in the strike. As the Board recognized in *Newport News* and *Brewton Fashions*, Section 8(a)(1) places an affirmative duty on the Company not to acquiesce in the subjugation of Plaintiffs' Section 7 rights by their co-workers.[4] Thus, the Nebraska

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[4] Plaintiffs' attempts to distinguish *Newport News* and *Brewton Fashions* are unpersuasive. That neither case discussed preemption or involved employees bringing state law claims against their employer (Pl. Pet. at 14-15) is hardly surprising, as the NLRB does not hear state law claims. If anything, Plaintiffs' observations merely confirm that their claims seek to impinge on "the exclusive jurisdiction of the Board over matters arguably within the reach of the Act." *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 680 (1983). Moreover, while Plaintiffs argue that *Newport News* and *Brewton Fashion* merely address "controversies between competing unions and their employer" (Pet. at 14), no such limitation is apparent from either of the Board's holdings. Further, implying

Supreme Court correctly concluded that AS Mid-America's "failure to fulfill these promises [of non-harassment] and/or the condonation of the acts committed by union officials is actually or arguably prohibited by the NLRA." (App. 21).

The Nebraska Supreme Court then addressed the critical inquiry: whether Plaintiffs' claims are identical to those that could have been presented to the NLRB. *Sears*, 436 U.S. at 197; *Belknap*, 463 U.S. at 510. As the Court noted, AS Mid-America's alleged failure to protect Plaintiffs from harassment would, if proved, not only constitute a breach of an oral agreement, but also a violation of federal labor law. (App. 22). *See also Newport News*, 236 NLRB at 1506-07; 29 U.S.C. § 158(a)(1). Moreover, "the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment." (App. 22). Where the controversies are identical, as they are here, state court jurisdiction must yield. *Sears*, 436 U.S. at 197; *Belknap*, 463 U.S. at 510. Thus, the Nebraska Supreme Court's conclusion that the NLRA preempted Plaintiffs' oral contract claims is faithful to the analysis set forth in *Garmon* and its progeny.

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such a limitation would run counter to the language of the NLRA, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of rights protected under Section 7 of the Act. 29 U.S.C. § 158(a)(1).

C. The Nebraska Supreme Court Properly Concluded *Belknap* Is Inapplicable On Its Facts

Despite this straightforward analysis, Plaintiffs maintain that the Nebraska Supreme Court disregarded this Court's holding in *Belknap*. To the contrary, the Nebraska Supreme Court found "guidance" from *Belknap*. (App. 14). As even Plaintiffs grudgingly concede, the Nebraska Supreme Court "examined the facts of *Belknap* in detail." (Pet. at 13). In *Belknap*, the employer promised its strike replacement workers that they would be retained beyond the conclusion of the strike. *Belknap*, 463 U.S. at 494-95. Indeed, strike replacements signed documents confirming that they were permanently replacing striking workers. *Id.* When the strike concluded, however, the employer reneged on its commitment to the strike replacements and laid them off in favor of the returning strikers. *Id.* at 496. The laid off replacements sued for breach of contract and misrepresentation.

In analyzing whether the replacement workers' claims were preempted by *Garmon*, this Court reiterated that the critical inquiry is "whether the controversy presented to the state court is identical with that which could be presented to the [NLRB]." *Belknap*, 463 U.S. at 510. Under the facts in *Belknap*, the focus of any NLRB proceeding would be whether the offer of permanent employment to the replacements violated the Section 7 rights of the *strikers* to be reinstated at the conclusion of an unfair labor practice strike. 463 U.S. at 509-10. Indeed, the NLRA precludes the permanent replacement of unfair labor practice strikers. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Conversely, the controversy

brought before the state court focused on whether the discharge of the replacements at the end of the strike violated the rights of the *replacements*. Thus, the controversies were very different, one focusing on the propriety of hiring the replacements, and one focusing on the propriety of firing them. Significantly, the employer never contended that the act of discharging the replacements was an unfair labor practice. Accordingly, the Supreme Court refused to apply the *Garmon* doctrine under those facts.

The Nebraska Supreme Court correctly concluded that the facts in *Belknap* are "distinguishable from those in the case at bar." (App. 20). Here, Plaintiffs were not discharged or laid off at the conclusion of the strike as occurred in *Belknap*. Moreover, the nature of the alleged promise was different: "[i]n *Belknap, Inc.*, the employer promised the replacement workers nothing more than permanent employment. In the instant case, AS Mid-America promised the replacement workers not only permanent employment, but also protection from harassment, discrimination and intimidation." (App. 20). Indeed, the gist of Plaintiffs' complaint is that the Company allowed union employees to "conduct a campaign of harassment and intimidation against permanent replacement and cross-over workers." (Pet. at 3-4).

Thus, unlike in *Belknap*, resolution of the "critical inquiry" mandates preemption, because "the conduct at issue or the controversy presented was identical to that which could be presented to the NLRB." (App. 19). *See also Belknap*, 463 U.S. at 510. As the Nebraska Supreme Court concluded:

> The conduct attributed by appellants to AS Mid-America – the failure to protect its employees from harassment – would be, if proved, both a breach of the putative oral contract and a violation of federal labor law. Therefore, the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment. (App. 21-22).

In short, far from being in direct conflict with *Belknap*, the Nebraska Supreme Court carefully distinguished *Belknap's* facts and applied *Belknap's* holding to conclude that the NLRA preempted Plaintiffs' claims in this case.[5]

D. The Nebraska Supreme Court's Preemption Analysis Is Not Out-Dated

Citing to a footnote in Chief Justice Rehnquist's dissent in *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983), Plaintiffs next argue that the Nebraska Supreme Court's preemption analysis is "outdated." (Pet. at 15). That argument is entirely without merit. In his *Jones* dissent, Chief Justice Rehnquist merely observed that the preemption analysis set forth in *Iron*

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[5] Indeed, the Nebraska Supreme Court concluded that Plaintiffs' fraudulent misrepresentation claim was not preempted under *Belknap* because, unlike the breach of contract claim, "maintaining a misrepresentation action would not interfere with the NLRB's determination of matters within its jurisdiction and . . . such an action is of no more than peripheral concern to the NLRB and the federal labor law." (App. 32).

Workers v. Perko, 373 U.S. 701 (1963), was no longer dispositive, because in *Perko*, "the mere fact that a state law claim was based upon arguably prohibited conduct dictated the conclusion that the state law claim was preempted." *Jones*, 460 U.S. at 685 n.2 (Rehnquist, J. dissenting). Since then, the Court has emphasized that the critical inquiry in applying the *Garmon* rule "is whether the controversy presented by the state court is identical with that which could be presented to the Board." *Belknap*, 463 U.S. at 510.

That is the *exact* analysis that the Nebraska Supreme Court applied in this case to hold Plaintiffs' claims preempted. *See* App. 21-22 ("the conduct at issue and the controversy presented is identical to that which would be presented to the NLRB"). In fact, the Nebraska Supreme Court does not even mention *Perko* in its decision. In short, the court's analysis is entirely consistent with current *Garmon* preemption doctrine.

Plaintiffs also claim that the Nebraska Supreme Court ignored the "overwhelming exceptions" to the *Garmon* rule set forth in *Sears* and *Farmer v. Carpenters*, 430 U.S. 290 (1977). (Pet. at 16). That argument fundamentally misconstrues the scope of *Garmon* preemption. The exceptions to the *Garmon* rule "serve only as more precise demarcations of the scope of *Garmon* preemption. They have not redefined the nature of that preemption in any way." *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 381 (1986) (emphasis added) (noting that the rule is "[s]ubject to exception only in *limited* circumstances," *Id.* at 392-93); *see also Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468

U.S. 491, 502 (1984) ("a presumption of federal preemption applies even when the state law regulates conduct only arguably protected by federal law" and that this presumption "properly admits to exception when *unusually* 'deeply rooted' local interests are at stake") (emphasis added).

Moreover, both *Sears* and *Farmer* are inapposite. In *Sears*, "the state court action was for trespass. It challenged only the location of the Union picketing. The unfair labor practice charge, however, would have focused on whether the picketing had recognitional or work reassignment objectives, issues 'completely unrelated to the simple question whether a trespass had occurred.' " *Jones*, 460 U.S. at 682-83 (citing to *Sears*, 436 U.S. at 198).

Similarly, in *Farmer*, a union member brought an action for intentional infliction of emotional distress against the union and its officers, claiming that he was subjected to a campaign of personal abuse and harassment in addition to continued discrimination in referrals from the hiring hall. 430 U.S. at 292. This Court held that the NLRA did not preempt the intentional infliction claim, because the focus of any unfair labor practice proceeding "would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues." *Id.* at 304. By contrast, whether the union officers' statements or conduct also caused the plaintiff emotional distress and physical injury "would play no role in the Board's disposition of the case, and the Board could not

award [plaintiff] damages for pain, suffering, or medical expenses." *Id.*[6]

Thus, in both *Sears* and *Farmer*, the controversies were not identical, and preemption was unnecessary. By contrast, as the Nebraska Supreme Court observed here, "the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment." (App. 22). Therefore, the threat of creating inconsistent obligations under state and federal law is very real. In their complaints, Plaintiffs specifically contend that the Company breached a contract and acted tortiously by, among other things, allowing union members "to come to work wearing union T-shirts," affix union bumper stickers to their (the union members) cars, etc. Plaintiffs seek to have a state court jury award them damages based on these allegedly wrongful acts. In fact, AS Mid-America would have clearly violated federal labor law had it forbidden or disciplined union members for wearing union T-shirts or placing union bumper stickers on their cars. *See Escanaba Paper Co.*, 314 N.L.R.B. 732, 733 (1994) (employees wearing T-shirts or buttons stating "No Scabs" protected by Section 7 of the NLRA). Avoiding this exact type of situation is precisely the reason the *Garmon* doctrine was recognized by the United States Supreme Court, and requires the dismissal of Plaintiffs' claims. Therefore,

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[6] Significantly, the Nebraska Supreme Court did not conclude that Plaintiffs' intentional infliction claims in this case were preempted, but instead held that they failed to state a cognizable claim under state law. (App. 32-33).

unlike in *Sears* and *Farmer*, the danger of creating state law obligations which conflict with the federal scheme is overriding, and placing the controversy solely within the jurisdiction of the NLRB is necessary.[7]

Finally, Plaintiffs claim that they seek "monetary damages which the Board cannot provide." (Pet. at 19). In fact, however, the Board is entitled to provide employees with back pay relief, the very kind of monetary damages that Plaintiffs could obtain in their breach of contract claim. *See generally* 29 U.S.C. § 160. Regardless, "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Garmon*, 359 U.S. at 247, 79 S. Ct. at 781. *See also Jones*, 460 U.S. at 684, 103 S. Ct. at 1463 (rejecting plaintiff's argument that he should be permitted to go forward in the state court because he could be awarded punitive damages and attorneys' fees, whereas he would be limited to backpay if his complaint had gone forward before the Board). Moreover, Plaintiffs had the option of seeking broader remedies by filing suit against those they claim

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[7] *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), has no bearing on this case. In *Linn*, this Court held that a state action for malicious libel in the course of a labor dispute was not preempted, because the malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. *Id.* at 63. Moreover, while such statements arguably could constitute a violation of Section 8 of the NLRA, the Board would look only to the coercive or misleading nature of the statements rather than their defamatory quality. *Id.* Thus, unlike here, the focus of the state and Board proceedings would not be the same.

perpetrated acts of violence and intimidation against them. Their decision to forego such suits does not exempt them from the application of the *Garmon* preemption doctrine in the lawsuit they chose to file against their former employer.

II. The Nebraska Supreme Court's Conclusion That Section 301 Pre-Empts Plaintiffs' Third Party Beneficiary Claim Is Unremarkable And In Accord With Longstanding Supreme Court Precedent

As a second reason for granting the writ, Plaintiffs argue that whether their breach of contract claims survive preemption under Section 301 "is an issue which has not yet been decided by this Court." (Pet. at 21). To the contrary, this Court has long held that Section 301 preempts breach of contract claims arising out of a strike settlement agreement, such as the Return to Work Resolution in this case.

Section 301 specifically vests the federal courts with subject matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . " 29 U.S.C. § 185. To avoid the potential for creating inconsistent obligations under state and federal law, federal law must be applied to suits involving contracts covered by Section 301. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) ("[T]he substantive law to apply in suits under Section 301 is federal law, which the courts must fashion from the policy of our national labor laws.")

In *Retail Clerk's International Association, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), this Court held that strike settlement agreements are contracts between an employer and a labor organization within the meaning of Section 301. In *Lion Dry Goods*, the employer and its union negotiated a strike settlement agreement which contained a non-discrimination provision and an arbitration provision concerning disputes arising under the strike settlement agreement. *Id.*, 369 U.S. at 20 n.4.[8] A dispute arose under the strike settlement agreement and the parties arbitrated that dispute. *Id.* at 23. Subsequently, the employer refused to abide by the arbitration award and the union filed suit under Section 301. *Id.* The union argued that the strike settlement agreement constituted a contract for purposes of Section 301. Conversely, the employer argued that only certain types of contracts (*i.e.* collective bargaining agreements) satisfy the contract requirement of Section 301. *Id.* at 23-25.

This Court determined that a strike settlement agreement was a contract covered by Section 301:

> We find, then, from a reading of the words of § 301(a), both in isolation and in connection with the statute as a whole, no basis for denying jurisdiction of the action based upon the alleged violation of the "strike settlement agreement."

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[8] The non-discrimination clause in *Lion Dry Goods* is quite similar to the one in the Resolution: "[n]o employee will be discriminated against, by reason of Union activities, membership or non-membership. All employees will continue to have job security and no employee will be discharged except for just cause." *Id.* at 20 n.4.

> Furthermore, the statute's purpose would be defeated by excluding such contracts from "contracts" cognizable under § 301(a). If this kind of strike settlement were not enforceable in § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult. It is no answer that in a particular case the agreement might be enforceable in state courts: a main goal of § 301 was precisely to end "checkerboard jurisdiction."

Id. at 27 (internal citations omitted).

Therefore, the Nebraska Supreme Court's conclusion that Section 301 preempted Plaintiffs' third party beneficiary claims under the Return to Work Resolution merely constituted a straightforward application of *Lion Dry Goods'* holding:

> In the instant case, as in *Lion Dry Goods*, a labor strike ensued and a mutual agreement was reached, intending to return working conditions to normal. As in *Lion Dry Goods*, the return to work resolution was a mutual agreement that AS Mid-America and union members negotiated and agreed upon, which essentially ended the strike and returned working conditions to normal. Just as in *Lion Dry Goods*, the return to work resolution addressed several issues significant to reestablishing and maintaining industrial peace, such as seniority, job classification, and job placement. The return to work resolution also provided mechanisms for resolving a number of other issues, such as layoffs, overtime, vacations, grievance procedures, and shift bumping. (App. 25-26).

Plaintiffs concede that the right they seek to enforce "is included in a strike settlement agreement between Defendant and its unions." (Pet. at 27). They also recognize that *Lion Dry Goods* "extended Section 301 to include claims founded directly on rights arising out of a strike settlement agreement in addition to claims alleging the violation of a collective bargaining agreement." (Pet. at 23). Nevertheless, they inexplicably argue that their third party beneficiary claim based on the Resolution escapes *Lion Dry Goods'* holding because, in *Lion Dry Goods*, "the strike settlement agreement resembled a traditional collective bargaining agreement." (Pet. at 23). But *Lion Dry Goods* expressly rejected that same argument:

> It is argued that Congress limited § 301(a) jurisdiction to contracts that are "collective bargaining contracts," meaning, so runs the argument, only agreements concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees.
>
> The words of § 301(a) require no such narrow construction as is suggested; rather they negate it.

369 U.S. at 25. The contract at issue in *Lion Dry Goods* was a strike settlement agreement between an employer and a union. The Resolution at issue here is a strike settlement agreement between an employer and a union. Without question, the Resolution is a labor contract which must be interpreted by applying principles of federal labor law.

Nevertheless, Plaintiffs contend that none of the policies underlying *Lion Dry Goods* would be furthered by

preempting Plaintiffs' claims in this case. Citing to *Livadas v. Bradshaw*, 512 U.S. 107 (1994), they contend that Section 301's preemption principles are limited to the policy of preserving the effectiveness of arbitration clauses in collective bargaining agreements. (Pet. at 24-25). Thus, they argue, because they are "nonunion" employees who were not parties to a collective bargaining agreement, their state law claims are not arbitrable and should be resolved under state law. (Pet. at 23-25).

Plaintiffs fundamentally misunderstand the principles behind Section 301 preemption. Nothing in *Livadas* limits the scope of Section 301 preemption to enforcement of arbitration provisions. Rather, *Livadas* re-affirmed that the preemption rule applies to assure that state laws do not determine "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement." *Livadas*, 512 U.S. at 122-23 (internal citations omitted). Thus, Plaintiffs' status as nonunion members is irrelevant to the preemption analysis; rather, "it is the *legal character* of a claim, as 'independent' of rights under the collective-bargaining agreement, . . . that decides whether a state cause of action may go forward." *Livadas*, 512 U.S. at 123-24 (emphasis added) (internal citations omitted).[9] *See*

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[9] In *Livadas*, plaintiff brought a claim contending that the defendant had willfully failed to pay her wages promptly upon severance, in violation of California state law. This Court noted that there was no dispute over the amount of the penalty to which the plaintiff would be entitled. *Id.* at 125. Therefore, beyond the simple need to refer to bargained-for wage rates in computing the penalty, the collective bargaining agreement was irrelevant to the dispute and there was no reason to hold the

also Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 407 (1988) (state law claims are "independent" for § 301 preemption purposes only if "resolution of the state-law claim does not require construing the collective-bargaining agreement"). That analysis applies equally to strike settlement agreements such as the Return to Work Resolution. *Lion Dry Goods*, 369 U.S. at 25.

In this case, Plaintiffs' claims are not "independent" of the Return to Work Resolution. To the contrary, they arise *out of* the Resolution (Pet. at 27). Thus, "any attempt to assess liability here inevitably will involve contract interpretation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218 (1995) (holding state law tort claim pre-empted because the duties imposed by the state tort derived from the rights and obligations established by the labor contract). Therefore, Section 301 preempts Plaintiffs' claims.

Moreover, even under Plaintiffs' strained interpretation of *Livadas*, their claims still would be subject to preemption. By express reference in the Return to Work Resolution, any disputes arising under the terms of the Resolution had to be resolved through the grievance procedure. Therefore, their third party beneficiary claim *does* impact on the enforceability of arbitration promises. *Cf. Carr v. Pacific Maritime Association*, 904 F.2d 1313, 1315-16 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (failure of non-union casual employees covered under collective bargaining agreement to exhaust grievance procedure barred claim under Section 301). In short, Plaintiffs' claims are

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state law claim pre-empted under Section 301. *Id.* Thus, unlike in this case, the *Livadas* plaintiff's claims did not arise out of the labor agreement.

clearly preempted and must be resolved by applying principles of federal labor law.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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